IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No. 280 of 1995
Reserved on 27.7.2007
Date of decision 14.8.2007

Smt.Devku and others Appellants

Versus

Smt.Sunari and others Respondents

Coram:

The Hon'ble Mr.Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the Appellants: Mr.K.D.Sood, Advocate.

For the Respondents: Mr.Tarlok Chauhan, Advocate,

Rajiv Sharma, J.

A challenge has been laid by way of this regular second appeal to the judgment and decree passed by the Additional District Judge, Kullu on 1.5.1995 in Civil Appeal No.58 of 1993.

The brief facts necessary for the adjudication of the second appeal are that the appellants-plaintiffs hereinafter referred to as the plaintiffs for convenience sake, had filed a civil suit in the court of Senior Sub Judge, Lahaul-Spiti District at Kullu for declaration.

The trial court on the basis of the pleadings of the parties had framed the following issues:-

1. Whether the plaintiffs are co-owners in possession with defendants No.1, 7 & 8 of suit land, as alleged? OPP

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

2. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction as prayed? OPP

3. Whether Shri Himatu executed a valid will on 16.4.1985 in favour of defendant No.1 as alleged? OPD-1

4. Whether the sale of the suit land by defendant No.1 in favour of defendant No.5, 2 to 6 dated 25.2.1991 is null and void and without title as alleged? OPP

5. Whether the plaintiffs are estopped from filing this suit by their acts and conduct as alleged? OPDs

6. Whether the suit is properly valued for purpose of court fee and jurisdiction and in alternative relief of possession? If not what is correct valuation? OP Parties

7. Whether the defendant No.1 was ostensible owner of the land in suit with the consent of the plaintiff and defendants No.5, 2 to 6 and bonafide purchasers as alleged in para No.4 of the preliminary objection of written statement? OPD-2 to 6

8. Relief

The trial court had given the following findings on the issues framed hereinabove:

Issue No.1 Yes

Issue No.2 Yes

Issue No.3 No

Issue No.4 Yes

Issue No.5 No

Issue No.6 Yes

Issue No.7 No

Relief Suit of the plaintiffs is decreed as per operative portion of judgment.

The trial court on the basis of the evidence led by the parties had decreed the suit of the plaintiffs and declared the Will Ex.DW-2/A dated 16.4.1985 as forged and fictitious document. The trial court had also declared the sale of the suit land by the defendant No.1 in favour of defendants No.2 to 6 dated 25.2.1991 as null and void.

Feeling aggrieved by the judgment and decree dated 30.8.1993 passed by the trial court, defendant No.1 Smt.Sunari filed an appeal before the learned Additional District Judge, Kullu on 23.9.1993. The defendants No.2 to 6 had also preferred an appeal against the judgment and decree passed by the trial court before the Addl. District Judge, Kullu. The learned Additional District Judge had framed the following points for determination:-

Point No.1 Whether it is satisfactorily proved on record that Himatu deceased had executed the Will Ex.DW2/A in favour of the defendant-appellant Smt.Sunari, as alleged?

Point No.2 Final order.

The learned District Judge had recorded the following findings on the aforesaid points:

Point No.1 Yes

Point No.2 Both the appeals are accepted as per operative portion of judgment.

The learned Additional District Judge accepted both the appeals and judgment and decree passed by the trial court was set aside on 1.5.1995.

The present appeal has been filed by the plaintiffs-appellants against the judgment and decree passed by the learned Additional District Judge, dated 1.5.1995.

This second appeal was admitted by this Court on the following substantial questions of law:

1. Whether on the material on record, the only irresistible conclusion which could be drawn was that the Will Ex.DW2/A was a forged and fictitious document and had not been executed by Himtu in a sound disposing mind?

2. Whether the suspicious circumstances attached to the execution of Will Ex.DW2/A have been explained and the court below was justified in depriving the natural heirs of Himtu who were solely dependent on the property, moreso, when they were minors and widow?

3. Whether the important document which was a foundation of the case, particularly DW2/A, DW1/A and PX, PY and PZ and PZ/1 have been misread and misconstrued and wrong inferences drawn from the facts proved on the record?

4. Whether the sale deed Ex.DW1/A did not confer any right in favour of the vendees when Sunari had not inherited the property and was not the sole owner of the property and the suit as framed was liable to be decreed

I have heard the learned counsel for the parties and have also gone through the record of the case.

All the substantial questions of law being interconnected are taken up together.

Sh.Himatu father of the plaintiffs died on 13.9.1988. The Will in question was executed on 16.4.1985. The appellant-plaintiff No.1 Smt.Devku is the wife of late Sh.Himatu and Kumari Dhalu and Kumari Koyla are the daughters of late Sh.Himatu. The case set up by the plaintiffs before the trial court was that no Will was executed by late Sh.Himatu in favour of Smt.Sunari defendant No.1 on 16.4.1985. The plaintiff Smt.Devku had appeared as PW-1. She had testified that Sh.Himatu could not see for the last 5-6 years before his death. She had further stated that she was looking after Sh.Himatu. She had denied that she was present before the Tehsildar. PW-2 Khub Ram had testified that Sh.Himatu was blind. PW-3 Narain Dass had categorically stated in his statement that Sh.Himatu became blind before his death. He had denied that Smt.Devku was present before the Tehsildar at the time of changing the revenue entries. PW-4 Rai Ram had also testified that Sh.Himatu was blind at the time of his death. He had stated that he had not noticed that defendant Smt.Sunari was taking care of Sh.Himatu.

The defendant Smt.Sunari had appeared as DW-1. She had testified that she was looking after her father Sh.Himatu. She had stated in her

cross-examination that at the time when the Will was read over to her the name of her sister Dhalu was mentioned. DW-2 Man Sukh had scribed the Will. He had denied that Sh.Himatu was blind. DW-3 Karmu is the attesting witness. He could not point out whether Sh.Himatu had put his right or left thumb impression on the Will. DW-4 Prem Singh is the secretary of the Gram Panchayat who had brought the record to substantiate that Smt.Sunari was living with Himatu at the time of his death. DW-5 is Mohar Singh to whom the land had been sold by Smt.Sunari. He had supported the version of DW-1. DW-6 is Smt.Virma. She had categorically stated that Sh.Himatu had become blind for the last 5-6 years and was patient of asthma. She had denied the execution of the Will by her father in favour of his daughter Smt.Sunari. She had also not admitted that Sunari was looking after Himatu. She had admitted that Himatu was a simpleton.

The trial court on the basis of the evidence had found the Will Ex.DW2/A to be a fictitious and forged document. He had also declared the sale effected by Smt.Sunari defendant No.1 in favour of Mohar Singh and others is null and void. The Additional District Judge, Kullu had come to the conclusion that the Will in question i.e. Ex.DW2/A dated 16.4.1985 was valid and accordingly set aside the judgment and decree passed by the trial court. I have gone through the Will Ex.DW2/A. Sh.Himatu had declared in his Will that he was not keeping good health and was an old man. In the Will the details of four sisters have been given. If the Will was being executed by the father there was no occasion for him not to give detail of 5th daughter. The Will has been executed in favour of only one daughter Smt.Sunari. There is over whelming evidence on record that Sh.Himatu was blind and was also sick. PWs No.1 to 4 and DW-6 are unanimous in their statements that Sh.Himatu had become blind. There is sufficient evidence on record to

come to the conclusion that it was the plaintiff Smt.Devku who was looking after Sh.Himatu and not Smt.Sunari. DW-2 Man Sukh, who had scribed the Will had stated in his cross-examination that Sh.Himatu was not blind. His statement on the basis of overwhelming evidence of the PWs 1 to 4 and DW-6 cannot be believed. DW-3 Karmu was not sure whether Himatu had put his left or right thumb impression on the Will Ex.DW2/A. The plaintiff Smt.Devku had denied that she was ever present before the Tehsildar at the time when the revenue entries were changed. It has come in the evidence that there is considerable distance between two villages i.e. where Sh.Hamatu was living and village where Smt.Sunari was living. Sh.Himatu had excluded his wife and even two minor daughters from the Will. He has not stated anything about the well being of his daughters. The fact that Sh.Himatu was blind and had excluded his wife and minor daughters from the Will is a circumstance which would render the Will Ex.DW2/A suspicious. It appears that defendant Smt.Sunari had taken advantage of Sh.Himatu's blindness and his ailing health. Defendant Sunari had sold the land to Mohar Singh, Hira Lal, Karam Singh, Man Chand and Shiv Ram on the basis of alleged Will. The trial court had come to the right conclusion that the Will effected in favour of aforesaid persons on 25.2.1991 was null and void. They could not purchase the land since the Will Ex.DW2/A was not valid and bindings upon the plaintiffs.

The propounder of the Will Smt.Sunari had not explained the circumstances why the Will was executed and registered without the knowledge of Smt.Devku wife of Sh.Himatu. A grave suspicion also arises since the widow and minors have been deprived of the property. The disposition made in the Will is unnatural and improbable as no sane person,

save and except, for very cogent reasons would disinherit his widow and minor children as has been done by way of present Will.

Their Lordships of the Apex Court has held in **Adivekka and ors. Vs. Hanamavva Kom Venkatesh 'D' by LRs. & Anr**., 2007(7) SCALE 37 that where there are suspicious circumstances, the onus would be on the propounder to remove suspicion by leading appropriate evidence. Their Lordships have held as under:

> " Why a Will had to be executed and registered without the knowledge of his wife by Hanumanthappa has not been explained. There is nothing on record to show that the testator had any special love or affection for Respondent No.1. Respondent No.1 did not examine herself. According to her, she was not even aware of the execution of the Will. She came to know the same at a much later stage, i.e. , after lapse of 10-12 months. How and on what basis she obtained the possession of the original Will is not known. On what basis the Sub-Registrar handed over possession of the Will to DW-1 has not been disclosed. Had she examined herself, she could have been accosted with the said question. It could have been shown that Hanumanthappa did not have any love and affection for her. Non-examination of the party to the lis would lead to drawl of an adverse inference against her. {See Sardar Gurbakhsh Singh v. Gurdial Singh and Another, AIR 1927 PC 230, Martand Pandharinath v. Radhabai, AIR 1931 Bom.97, Sri Sudhir Ranjan Paul v. Sri Chhatter Singh Baid & Anr., Tulsi and Others v. Chandrika Prasad and Others, (2006) & SCC 322 and Binapani Paul v. Pratima Ghosh & Ors.,{2007 (6) SCALE 398}
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> Grave suspicion in regard to the execution of the Will arises as husband of Respondent No.1 being her power of attorney holder spoke of an agreement for sale. According to him, out of a total consideration of Rs.58,000/- or Rs.50,000/-, as the case may be , a sum of Rs.49,000/- had already been paid. If that be so, in ordinary course, he would have tendered the balance amount. He could have filed a suit for specific performance. At least a notice in that behalf could have been served. Husband of Respondent No.1, therefore,

admittedly had an eye over the property. Why only the agricultural land possessed by Hanumanthappa would be the subject matter of the Will, thus, in our opinion, has not been proved. Admittedly he had been suffering from cancer. He died only two weeks after the execution of the Will.

Contention of DW-1 that they were in possession of the land in question, cultivated the same for one year and thereafter sold the same, ex facie does not appear to be correct as the lands had been sold by her on 16.03.1989 whereas the testator died on 11.09.1988, i.e. within a period of six months from the date of execution of the Will.

The disposition made in the Will is unfair, unnatural and improbable as no sane person, save and except for very cogent reasons would disinherit his minor children. DW-1 does not state as to from where and how he obtained possession of the original Will.

According to DW-4, he went with the testator at about 4.30 p.m. on 25.08.1998 to Taluk Office. The Will is said to have been first scribed by one bond writer. The same thereafter was typed out by another typist. It was brought back to the same bond writer. He had allegedly read over the contents of the will whereafter only Hanumanthappa signed and thereafter the witnesses put their signatures. The entire process must have taken about two hours. How the Will could be registered on the same day, i.e. beyond the office hours is again a matter which is beyond anybody's comprehension. DW-5 did not say that the will was executed and registered before him.

In Rabindra Nath Mukherjee and Another v. Panchanan Banjerjee (Dead) by LRs. and others {(1995) 4 SCC 459}, wherein reliance has been placed by Mr.Mahale, the circumstances preceding the execution of the Will were taken into consideration. This Court in the factual matrix obtaining therein opined:

"8. If a total view is taken of the aforesaid circumstances, which has to be the approach, we are of the opinion that the courts below overplayed some circumstances which they regarded as suspicious and somehow missed some circumstances which bolstered the case of the propounders."

Similarly their Lordships have held in **Benga Behera & Anr. V. Braja Kishore Nanda & Ors.**, 2007(7) SCALE 228 that existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of Will has not been validly proved. Their Lordships have held as under:

> " Existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of the Will has not duly been proved.
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> We may, however, notice that in B.Venkatamunj v. C.J.Ayodhya Ram Singh & Ors. {2006(11) SCALE 148}, this Court upon considering a large number of decisions opined that proof of execution of Will must strictly satisfy the terms of Section 63 of the Indian Succession Act. It was furthermore held:
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> > "It is, however, well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made".
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> It was observed:
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> > "Yet again Section 68 of the Indian Evidence Act postulates the mode and manner in which proof of execution of document required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence."
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> It was emphasized that where there are suspicious circumstances, the onus would be on the propounder to remove the suspicion by leading appropriate evidence stating:
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> > "However, having regard to the fact that the Will was registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such prima facie case in which event that onus shifts back on the propounder to satisfy the court affirmatively that the testator did not know well the contents of the Will and in sound disposing capacity executed the same.

Each case, however, must be determined in the fact situation obtaining therein.

The Division Bench of the High Court was, with respect, thus, entirely wrong in proceedings on the premise that compliance of legal formalities as regards proof of the Will would sub-serve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance.

The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the records. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said court. It applied a wrong legal test and thus, came to an erroneous decision."

Yet again in Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors. {2006(14) SCALE 186}, this Court held:

"Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at lest by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

The burden of proof that the Will has been validly executed and is a genuine document is on the propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of the testator alone would not prove the execution thereof, if his mind may appear to be very

> feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. {See Madhukar D.Shende v. Tarabai Shedage (2002) 2 SCC 85 and Sridevi & Ors. V. Jayaraja Shetty & Ors, (2005) 8 SCC 784}. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

Noticing B.Venkatamuni (supra), it was observed;

> "The proof a Will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.
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> We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cses where there are only suspicions alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredibility is demanded from the judge even there exist circumstances of grave suspicion.{See Venkatachala Iyengar (supra)} {See also Joseph Antony Lazarus (Dead) by LRs. v. A.J.Francis, (2006) 9 SCC 515}."

The upshot of the above discussion is that the Will executed by Sh.Himatu i.e. Ex.DW2/A is not valid. The same is shrouded by suspicion. Neither cogent n0or convincing reasons have been assigned why the wife and minor daughters have been excluded from the property. The disposition made in the Will is not probable in view of the evidence which has come on record. Accordingly, this second appeal is allowed and the judgment and decree dated 1.5.1995 passed by the Additional District Judge, Kullu is set aside. The judgment and decree of the trial court dated 30.8.1993 is restored.

No order as to costs.

August 14,2007(g) **(Rajiv Sharma), J.**